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Supreme Court, U.S.
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NO. 94-169

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1994

TOM SWANNER, d/b/a WHITEHALL PROPERTIES,

Petitioner,

vs.

ANCHORAGE EQUAL RIGHTS COMMISSION, PAUL L. CONNERTY, EXECUTIVE DIRECTOR, ex rel. JOSEPH BOWLES, WILLIAM F. HARPER and DEE MOOSE,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ALASKA

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Is the decision of the Alaska Supreme Court based on independent and adequate state grounds?

2. Does enforcement of Alaska's laws against housing discrimination based on marital status violate Petitioner's rights under the free exercise clause of the First Amendment to the United States Constitution, under either the Smith test or the Sherbert/Yoder balancing test?

3. Does the Religious Freedom Restoration Act, 42 U.S.C. § 2000bb et. seq. (1993) violate the principle of separation of powers?

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STATEMENT OF THE CASE

Respondent Anchorage Equal Rights Commission (AERC) accepts the statement of facts in Petitioner's Statement of the Case, but believes clarification is necessary for an accurate understanding of the decision this Court is asked to review. At issue is whether the Alaska Supreme Court correctly concluded that the First Amendment free exercise clause does not entitle Petitioner to engage in discriminatory conduct in his commercial business, in violation of specifically applicable state and municipal civil rights legislation.

Petitioner's commercial activity is real estate rental. The conduct prohibited by Alaska law[1] is his refusal to rent real property to unmarried couples on the basis of their marital status.

Applying the balancing test set out by this Court in Sherbert v. Verner and Wisconsin v. Yoder, the Alaska Supreme Court found as a matter of state law that Petitioner was not entitled to an exemption under the free exercise clause of the Alaska Constitution. The court reached the same conclusion with respect to the U.S. Constitution, based on its separate analysis under Employment Div., Dept. of Human Resources of Oregon v. Smith, 494 U.S. 872 (1990) (hereinafter "Employment Division v. Smith").

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[1] See Foreman v. Anchorage Equal Rights Comm'n, 779 P.2d 1199, 1203 (Alaska 1989).

Petitioner moved for rehearing on grounds that Congress' recent enactment of the Religious Freedom Restoration Act (RFRA) reinstated the pre-Smith (Sherbert) balancing test for First Amendment free exercise claims under the U.S. Constitution. Since the court had already analyzed Alaska's identical free exercise clause under this balancing test, the court issued a revised opinion stating that RFRA would not change its holding since the RFRA test was satisfied by the state constitutional analysis.

Swanner's Petition for Writ of Certiorari should be denied either for lack of federal question jurisdiction or by reason of the substantive merits of the challenged decision.

SUMMARY OF THE ARGUMENT

Swanner's Petition for Writ of Certiorari should be denied by the Court for a number of reasons. First, the decision of the Alaska Supreme Court which Petitioner asks this Court to review is expressly and independently based on an analysis and interpretation of the Alaska Constitution. Pursuant to state law, the court determined that Swanner is not entitled to an exemption from state and municipal civil rights laws which prohibit discrimination in housing based upon marital status, because the state has a clearly expressed interest of the highest order in prohibiting such conduct. The Alaska court's decision is independent of the federal question, rests squarely on adequate state grounds, and thus is not a proper subject for review by this Court.

Second, there is no conflict between the Alaska court's determination of a federal question and any determination by another state court that might justify review. The cases which Petitioner cites are either intermediate appellate decisions and not the decisions of state courts of last resort, or are decisions expressly decided on state constitutional grounds under free exercise provisions significantly dissimilar to the U.S. and Alaska Constitutions.

The Alaska court's decision is also correct on its substantive merits. Petitioner agrees that the court correctly analyzed and applied the rule announced in this Court's Smith decision to his free exercise claim.

Petitioner's claim is that the Religious Freedom Restoration Act (RFRA) rejected the Smith rule and "restored" this Court's previous free exercise analysis as described in the Sherbert/Yoder cases. However, in requesting that this Court review the Alaska decision, Petitioner ignores the fact that the Alaska court applied the Sherbert test to his free exercise claim as a matter of state constitutional law.

Because Petitioner's free exercise claim fails both the Smith and the Sherbert tests, it is unnecessary for this Court to decide which rule governs federal free exercise claims. For this reason it is also unnecessary for the Court to reexamine and overrule Smith, as urged by Petitioner, or to determine the constitutionality of the Religious Freedom Restoration Act. Respondents assert that this case simply does not present any "special and important reasons" justifying this Court's exercise of discretionary review.

Should this Court determine to grant the Petition for Writ of Certiorari, Respondents believe that it would be appropriate for the Court to consider the constitutionality of RFRA in resolving Petitioner's question as to the appropriate federal constitutional analysis of his free exercise claim.

ARGUMENT

I. THE COURT SHOULD DECLINE TO HEAR THIS CASE BECAUSE THERE IS NO FEDERAL QUESTION IN CONFLICT

A. THE ALASKA SUPREME COURT DECISION IS BASED ON STATE LAW GROUNDS THAT ARE INDEPENDENT OF THE FEDERAL QUESTION AND ADEQUATE TO SUPPORT THE JUDGMENT

This Court has stated that it "will not review a question of federal law decided by a state court" if that court's decision "rests on a state law ground that is independent of the federal question and adequate to support the judgment." Coleman v. Thompson, 501 U.S. 722, 111 S. Ct. 2546, 2553-54 (1991). Granting review in such cases offends traditional notions of federalism, and could only result in the rendering of an advisory opinion, since the state court judgment would be unaffected by the Court's determination of the federal question. Id.[2]

[2] Similarly, this Court has said "[i]t is fundamental that state courts be left free and unfettered by us in interpreting their state constitutions." Michigan v. Long, 463 U.S. 1032, 1041 (1983) (citation omitted).

Here, Petitioner's First Amendment free exercise claim was analyzed and decided in accordance with this Court's decision in Employment Division v. Smith, 494 U.S. 872 (1990).[3] See Swanner v. Anchorage Equal Rights Comm'n, 874 P.2d 274, 279-80 (Alaska 1994), Petition for Writ of Certiorari (hereinafter "Petition"), App. A at 15-23. Petitioner's claim under the identical free exercise clause of the Alaska Constitution, in contrast, was analyzed and decided according to the Sherbert/Yoder balancing test,[4] which had previously been adopted and endorsed by the Alaska Supreme Court in Frank v. State, 604 P.2d 1068 (Alaska 1979).

Because the government's burden is greater under the Sherbert/Yoder test than it is under the Smith

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[3] "[A] law that is neutral and of general applicability need not be justified by a compelling governmental interest even if the law has the incidental effect of burdening a particular religious practice." See Church of the Lukumi Babalu Aye v. City of Hialeah, 113 S. Ct. 2217, 2226 (1993) (citing Employment Division v. Smith, 494 U.S. 872 (1990)).

[4] "[R]eligiously impelled actions can be forbidden only where they pose 'some substantial threat to public safety, peace or order,' or where there are competing governmental interests that are 'of the highest order and [are] not otherwise served." Frank v. State, 604 P.2d 1068, 1070 (Alaska 1979) (quoting respectively, Sherbert v. Verner, 374 U.S. 398, 403 (1963) and Wisconsin v. Yoder, 406 U.S. 205, 215 (1972)).

test, this Court's federal question determination would not affect the outcome of the case. The state law grounds of the challenged decision are clearly "independent" of the federal law grounds[5] and are "adequate" to support the judgment against Petitioner. This is the classic situation in which denial of a Petition for Writ of Certiorari is required.[6]

B. THERE IS NO CONFLICT BETWEEN THE ALASKA COURT'S FEDERAL QUESTION DETERMINATION AND THE DECISIONS OF THE MINNESOTA, MASSACHUSETTS OR CALIFORNIA COURTS

The four cases Petitioner cites as conflicting with the Swanner decision are either based entirely on interpretations of state constitutions, or they are not decisions from the state courts of last resort. The Minnesota Supreme Court specifically said in the French

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[5] "[W]e conclude that enforcement of AMC 5.20.020 and AS 18.80.240 against Swanner does not violate his right to free exercise of religion under the Alaska Constitution." Swanner v. AERC, 874 P.2d at 280, Petition, App. A at 15.

[6] This also eliminates any need for this Court to reconsider its Smith decision. See N.L.R.B. v. Hanna Boys Center, 940 F.2d 1295, 1305 (9th Cir. 1991) (unnecessary to decide Smith's application where free exercise claim could not survive even the Sherbert test), cert. denied, 112 S. Ct. 2965 (1992).

case, "[s]ince our decision is based entirely on interpretation of our state statutes and on the Minnesota Constitution, we need not address respondent's arguments as to the application of the United States Constitution, and we decline to do so." Minnesota v. French, 460 N.W.2d 2, 11 (Minn. 1990). In addition, the free exercise language of the Minnesota Constitution differs dramatically from that of the U.S. and Alaska Constitutions.[7]

Similarly, the recent Massachusetts case of Attorney General v. Desilets, 636 N.E.2d 233 (Mass. 1994) is also based entirely on state constitutional grounds. Id. at 235-36.[8] Thus, it does not pose the

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[7] Unlike the Alaska laws, the Minnesota statute did not define "marital status." Id. at 4. Construing it to include unmarried cohabiting couples would have been in direct conflict with Minnesota's fornication statute, its legislature's express intent to "discourag[e] the practice of fornication and protect the institution of marriage," and case law. Id. at 4-7. Alaska, in contrast, had repealed its fornication statute several years earlier. The Alaska Supreme Court took note of the French decision, stating that for the foregoing reasons, it did not provide the court with "meaningful guidance in interpreting the Free Exercise Claim of the Alaska Constitution." Swanner, 874 P.2d at 281 n.10, Petition, App. A at 16.

[8] The court recognized Smith as the rule for the federal First Amendment claim, but undertook no analysis of it. Desilets, 636 N.E.2d at 236. It

sort of conflict which gives rise to "federal question" review under 28 U.S.C. § 1257(a) and Sup. Ct. R. 10.1(b) (1994). Moreover, the cited case is not a final decision from a state court of last resort. The Massachusetts court simply vacated a grant of summary judgment and remanded the case to the trial court. Even in remanding the case, the Massachusetts court made clear it was not precluding the government from demonstrating a more narrow "compelling interest," i.e., an interest in eliminating marital status discrimination in housing as opposed to just generally. Desilets, 636 N.E.2d at 238, 240-41. The Swanner decision is based precisely on the court's determination that such an interest exists.

This Court need not even consider the two California decisions which Petitioner cites because, by definition, neither can create a conflict over which the Court may exercise jurisdiction. Neither is from the "state court of last resort." Sup. Ct. R. 10.1(b) (1994). The decisions do not raise theoretical conflicts either.

In fact, in the most recent case (post-RFRA), the California court applied the federal Smith rule, noting it

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specifically based its decision solely on its interpretation of the Massachusetts Constitution. Massachusetts also has a fornication statute as well as a second constitutional article, unparalleled in the U.S. and Alaska Constitutions, protecting religious free exercise rights. Id. at 240-42.

"purports to be a logical extension of the established free exercise jurisprudence" of this Court. Smith v. Commission of Fair Employment and Housing, 30 Cal. Rptr. 2d 395, 400 (Cal. App. 1994). Because the Court of Appeals determined that the case was a "paradigm of the 'hybrid' genus" free exercise case, its outcome under Employment Division v. Smith is distinguishable and not in conflict with the outcome in Swanner. Id. at 403.[9]

The other case Petitioner cites is an unpublished appellate decision from the California Court of Appeals, which by court rule has no precedential value. Cal. R. Ct. 977(a). See Donahue v. Fair Employment Housing Comm'n, 2 Cal. Rptr. 2d 32 (Cal. App. 1991), review granted and opinion superseded, 825 P.2d 766 (Cal. 1992), review dismissed as improvidently granted, 859 P.2d 671 (Cal. 1993). Like the Minnesota and

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[9] In addition to her free exercise claim, plaintiff also claimed her First Amendment freedom of speech had been abridged. Id. at 401. The Court of Appeals concluded that the interest in eradicating housing discrimination against unmarried couples would have to give way to plaintiff's free speech and free exercise rights. Smith, 30 Cal. Rptr. 2d at 404, 406. It relied on the 'hybrid' nature of the case to distinguish its holding from federal cases that hold "in certain instances free exercise rights must give way to the greater public good." Smith, 30 Cal. Rptr. 2d at 406 (citing U.S. v. Lee, 455 U.S. 252 (1982) and Braunfield v. Brown, 366 U.S. 599 (1961)).

Massachusetts decisions, Donahue is based on state constitutional grounds and therefore raises no conflict with the Alaska decision here.[10]

II. THE ALASKA SUPREME COURT'S DECISION IS CORRECT ON THE MERITS AND THE OUTCOME IS THE SAME WHETHER THE CONTROLLING FEDERAL LAW IS SMITH OR THE SHERBERT/YODER TEST ENDORSED BY THE RELIGIOUS FREEDOM RESTORATION ACT

Petitioner's "Questions Presented" indicate that he does not disagree with the state court's analysis of his federal constitutional rights under Smith. He claims simply that after the enactment of the Religious Freedom Restoration Act (RFRA),[11] Smith is no longer controlling federal law and that the Sherbert/Yoder balancing test is again the rule. Petitioner glosses over the fact that the Alaska court did apply the "Sherbert/Yoder" test in construing the identical free exercise clause of the Alaska Constitution.

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[10] "Because we hold that the Donahues have a constitutionally based religious exemption on state constitutional grounds under pre-Smith case law, we need not address the Donahues' federal constitutional claim under Smith." Donahue, 2 Cal. Rptr. 2d at 40 n.10.

[11] 42 U.S.C. § 2000bb et. seq. (1993).

Under either analysis, Petitioner's claim of entitlement to an exemption from Alaska's laws against housing discrimination fails.

A. THE ALASKA COURT'S SMITH ANALYSIS OF SWANNER'S FIRST AMENDMENT FREE EXERCISE CLAIM IS CORRECT[12]

The free exercise analysis adopted by this Court in Employment Division v. Smith provides that "[a] law that is neutral and of general applicability need not be justified by a compelling governmental interest even if the law has the incidental effect of burdening a particular religious practice." Church of the Lukumi Babalu Aye v. City of Hialeah, 113 S. Ct. 2217, 2226 (1993) (citing Smith, 494 U.S. 872 (1990)). Smith preserves the balancing test where the implicated law is not neutral or generally applicable, or where a "hybrid" situation exists, i.e., some other constitutionally protected right, in addition to the free exercise right, is implicated. Id. at 2226-27.

Applying Smith, the Alaska Supreme Court correctly found (and Petitioner does not contest) that

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[12] Because Petitioner has not directly challenged the merits of the Court's Smith analysis, Respondents' discussion is brief and intended only to provide contrast to the stricter, Sherbert/Yoder balancing analysis which follows.

the anti-discrimination laws from which Petitioner seeks exemption were not crafted to impede particular religious conduct and are in every sense valid, neutral and generally applicable. Swanner, 874 P.2d at 279-80. Petition, App. A at 13.

The only other question which the Alaska court had to consider was whether this case presented a "hybrid" situation. Since Petitioner did not make any other constitutional claim, the court correctly reasoned that enforcement of Alaska's neutral civil rights laws against him did not violate the free exercise clause of the First Amendment. Id, at 280, Petition, App. A at 14. The court's federal constitutional conclusion was simple, straightforward and squarely in accordance with Smith.

B. THE ALASKA COURT CORRECTLY APPLIED THE SHERBERT/YODER BALANCING ANALYSIS TO SWANNER'S FIRST AMENDMENT FREE EXERCISE CLAIM

The Swanner court devoted the majority of its opinion to an analysis of Swanner's free exercise rights under the stricter, Sherbert/Yoder balancing test. Since this is also the standard presumably reinstated by the Religious Freedom Restoration Act, Respondents now turn to a demonstration of how the state court correctly decided Petitioner's First Amendment free exercise claim under the Sherbert/Yoder test.

On Rehearing, the Alaska Supreme Court assumed, and respondent here assumes for the sake of argument,[13] that RFRA does in fact apply to Petitioner's federal claim. It should be noted that just prior to RFRA's enactment, Congress inserted the word "substantially" before the word "burden," thereby requiring that one claiming an exemption must first demonstrate a "substantial" burden to his or her free exercise rights before the balancing test even comes into play.[14] Thus, the Alaska Supreme Court gave

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[13] Respondents do not intend to waive their argument, asserted in response to the Petition for Rehearing, that RFRA violates the doctrine of separation of powers and is unconstitutional. Respondents' argument concerning RFRA's constitutionality is set forth in Section III, infra.

[14] See discussion of Religious Freedom Restoration Act, A Word On . . . (Office of the General Counsel, National School Boards Association), Volume IX, No. 4 (Fall 1993). The sponsors of the bill cited two decisions that were not to be affected by RFRA, because the "burdens" were more along the lines of an "incidental impact" on a religious practice than a "substantial burden." Cited were Bowen v. Roy, 476 U.S. 693 (1986) upholding Social Security number system in welfare programs, and Lyng v. Northwest Indians Protective Association, 485 U.S. 439 (1988), holding that building a road through federal park land used by Native Americans for religious rituals does not offend the free exercise clause. 139 Cong. Rec. S14365 (daily ed. Oct. 26,

Petitioner the benefit of the doubt on the "substantiality" of the government burden on his free exercise rights.

Under the Sherbert/Yoder balancing test, in order to invoke the free exercise clause, the court must find that there is a religion, the conduct in question is religiously based, and the claimant's religious beliefs are sincere. Frank v. State, 604 P.2d 1068, 1071 (Alaska 1979) (citing Wisconsin v. Yoder, 406 U.S. 205, 215-16 (1972)). This preliminary inquiry determines whether the actor's conduct is "protected religious conduct." See Frank, 604 P.2d at 1073.

The Alaska court found Petitioner's refusal to rent to unmarried individuals to be "protected religious conduct." See Swanner, 874 P.2d at 281-82, Petition, App. A at 17-18. The court proceeded to apply the rule that "[r]eligiously impelled actions can be forbidden only 'where they pose some substantial threat to public safety, peace or order, or where there are competing governmental interests that are of the highest order and . . . [are] not otherwise served.'" Seward Chapel, Inc. v. City of Seward, 655 P.2d 1293, 1301 n.33 (Alaska 1982) (quoting Frank, 604 P.2d at 1070 (citations omitted)).

1993).

The Alaska court relied on the second part of this test, i.e., whether there was a "competing state interest of the highest order." Swanner, 874 P.2d at 282-83, Petition, App. A at 18-21. The court found Petitioner's conduct to be in direct conflict with two "competing state interests." Id. It found the state has a "derivative interest" in ensuring access to housing for all of its citizens and, second, that the state has a "transactional interest" in preventing individual acts of discrimination. Swanner, 874 P.2d at 282-83, Petition, App. A at 19-20. The Swanner court was careful to hold that the state's interest was in eliminating marital status discrimination in housing, not necessarily in eliminating marital status discrimination in general.[15] Id. at 283, Petition, App. A at 21.

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[15] Contrary to Petitioner's representation, the Swanner court did not, nor was it necessary to, constitutionally equate marital status with race and gender. The court found that the focus of the government's interest "is in specifically eliminating marital status discrimination in housing." Swanner, 874 P.2d at 283, Petition, App. A at 21. In fact, the court recognized that "to avoid fraudulent availment of benefits only available to spouses," it is "arguably necessary" for the state to treat legally married couples differently from unmarried couples in certain circumstances. Id.

Petitioner criticizes the court's derivative/transactional interest analysis as a "unique adaptation of Sherbert and Yoder." Petition at 8. Identifying these state interests by descriptive names, however, neither makes them any less compelling nor affects the integrity of the court's analysis. The court's holding is consistent with Alaska's public policy and case law.[16] See Loomis Elec. Protection v. Schaefer, 549 P.2d 1341, 1343 (Alaska 1976) (given its "strong statement of purpose," and its "avowed determination to protect the civil rights of all Alaska citizens, we believe legislature intended to put as many 'teeth' into [its civil rights laws] as possible") and Alaska USA Federal Credit Union v. Fridriksson, 642 P.2d 804, 806 (Alaska 1982) ("Alaska's civil rights statute should be broadly construed 'to further the goal of eradication of discrimination'").

The Alaska court specifically held that the government has a compelling interest which supports the statutory prohibition on marital status discrimination in housing. It further stated that the best way to eliminate housing discrimination based on marital status

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[16] [I]t is the policy of the state and the purpose of this chapter to eliminate and prevent discrimination in . . . accommodations and in the sale, lease, or rental of real property because of race, religion, color, national origin, age, sex, physical or mental disability, marital status, changes in marital status, pregnancy or parenthood. Id. at 280 n.8, Petition, App. A at 13 (quoting AS 18.80.200).

is to render it unlawful. Thus, the court found that the challenged laws are the least restrictive means of accomplishing this goal. Swanner, 874 P.2d at 280, Petition, App. A at 14. The court correctly ascertained the state interests promoted by the housing laws and considered the detrimental effect an exemption would have on those interests:

> [A]llowing housing discrimination that degrades individuals, affronts human dignity, and limits one's opportunities results in harming the government's transactional interest in preventing such discrimination.

Id. at 283, Petition, App. A at 20-21.

The court also found that the laws did not burden Petitioner's beliefs, but merely regulated Petitioner's conduct of a purely commercial activity in which he

voluntarily engaged.[17] Id. at 283, Petition, App. A at 22-23. These laws are binding on Petitioner to the same extent they are binding on everyone else who chooses to engage in that commercial activity. Finally, the Alaska Supreme Court expressly noted that

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[17] There is a difference between a strictly religious activity and a commercial activity with incidental religious implications. This Court's observation in United States v. Lee, is well taken:

> When followers of a particular sect enter into commercial activities as a matter of choice, the limits they accept on their own conduct as a matter of conscience and faith are not to be superimposed on the statutory schemes which are binding on others in that activity.

U.S. v. Lee, 455 U.S. 252, 261 (1982). See also Ryan v. U.S. Dept. of Justice, 950 F.2d 458, 462 (7th Cir. 1991) (sympathizing with dedicated FBI agent "trapped between his career and his faith," but upholding employer's discharge for refusing, on religious grounds, to handle certain assignments); cert. denied, 112 S. Ct. 2309 (1992); American Friends Serv. Comm. v. Thornburgh, 961 F.2d 1405, 1408 (9th Cir. 1991) ("right to hire" is of insufficient constitutional protection to convert single free exercise claim into a "hybrid" case); and Kissinger v. Board of Trustees, 5 F.3d 177, 180 (6th Cir. 1993) (no violation of free exercise rights since veterinary student was not compelled to attend school where operation on live animals was part of curriculum).

Petitioner's religiously impelled actions trespassed on the private rights of others.[18] Id. at 284, Petition, App. A at 23.

This case is clearly distinguishable from what might be considered a "close call" case. It is not a case wherein the law violated is obscure or insignificant, or where the religious based conduct is a private affair that causes no harm or detriment to others.[19] It is also not a case where the statute challenged has in place a "good cause" exception or other mechanism for permitting an individualized exemption. Sherbert v. Verner, 374 U.S. 398 (1963) (unemployment compensation law permitting individual to show "good cause" for failing to accept available work must permit free exercise exemption); accord, Thomas v. Review Board, Indiana Employment Div., 450 U.S. 707 (1981).

Nor would the exemption Petitioner seeks have little effect on the governmental interest at stake. Cf. Wisconsin v. Yoder, 406 U.S. 205, 221-30 (1972) (Amish informal vocational program does not impede state's interest in preparing educated, self-reliant citizens); Frank v. State, 604 P.2d 1068, 1073-74 (Alaska 1979) (exemption to hunting laws for Athabascans needing moose meat for funeral potlatch does not impede government interest in maintaining moose population). This case is akin to those in which the religious conduct was required to yield to the overriding public interest and common good advanced by the subject law. See, e.g., U.S. v. Lee, 455 U.S. 252, 258-60 (1982) (broad public interest in maintaining a sound tax system); Bowen v. Roy, 476 U.S. 693, 707-10 (1986) (Social Security number system clearly promotes a legitimate and important public interest).

In fact, this case is far more compelling than those in which the grant of an exemption would merely burden the administration of government, because the rights of third parties must be considered as well. The exemption Petitioner seeks is nothing short of a license to discriminate against unmarried couples who approach

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[18] Swanner's free exercise claim goes beyond merely an assertion that he should not be compelled to sin himself. His claim is rather that he should not be compelled to "facilitate" the sin of another. Petition at 5. His argument based on "facilitation" of sins impacts the rights of third parties who may not share his religious views, or whose sincerely held religious beliefs may permit cohabitation. Granting an exemption to the landlord in such an instance would raise establishment clause concerns by preferring one religious view over another, and could give rise to a claim by a prospective tenant of housing discrimination based on both marital status and religion.

[19] See, e.g., Lawson v. Dugger, 844 F. Supp. 1538, 1542 (S.D. Fla. 1994) (prisoner's reading of Hebrew Israelite literature); Frank v. State, 604 P.2d 1068 (Alaska 1979) (securing moose meat for Athabascan funeral potlatch).

his business to secure housing. Like all other Alaska citizens, these third parties have protected privacy interests as well as rights to be free from discrimination in housing. The Alaska Supreme Court's analysis is consonant with this Court's decision in Sherbert and Yoder and its judgment was absolutely correct.

> As [James] Madison summarized the point, free exercise should prevail in every case where it does not trespass on private rights or the public peace.

Swanner, 874 P.2d at 284, Petition, App. A at 23 (citing Michael W. McConnell, *Free Exercise Revisionism and the Smith Decision*, 57 Chi. L. Rev. 1109, 1145 (1990) (citation omitted)).

III. THE RELIGIOUS FREEDOM RESTORATION ACT, WHICH PURPORTS TO OVERRULE SMITH, IS UNCONSTITUTIONAL

Petitioner asserts here, as he did in his Petition for Rehearing before the Alaska Supreme Court, that RFRA "overrules" Employment Division v. Smith, and requires application of the Sherbert/Yoder "compelling interest test" to free exercise claims. Although deciding which law controls is unnecessary here since Petitioner's claim fails under both, should the Court decide to take this case, Respondents are prepared to demonstrate that RFRA is unconstitutional. In enacting RFRA, Congress quite simply attempted to overrule a

decision of this Court, and to instruct the Court as to the proper interpretation of the United States Constitution.

It has been settled law since 1803 that "[i]t is emphatically the province and duty of the judicial department to say what the law is." Marbury v. Madison, 5 U.S. 137, 177 (1803). As this Court reiterated more than 150 years later, Marbury v. Madison "declared the basic principle that the federal judiciary is supreme in the exposition of the law of the Constitution, and that principle has ever since been respected by this Court and the Country as a permanent and indispensable feature of our constitutional system." Cooper v. Aaron, 358 U.S. 1, 18 (1958).

This Court's supremacy in matters of constitutional interpretation is complete, even as against the actions of the other two branches of government. In enacting RFRA, Congress sought to reject the Court's interpretation of the First Amendment, and in so doing, exceeded its own constitutional authority. Contests between the three branches of government, while rare, are not unknown. However, even these contests are to be resolved by the Court, since the boundaries of each branch's power and authority are contained in the Constitution. "Deciding whether a matter has in any measure been committed by the Constitution to another branch of government, or whether the action of that branch exceeds whatever authority has been committed, is itself a delicate exercise in constitutional

interpretation, and is the responsibility of this Court, as ultimate interpreter of the Constitution." Baker v. Carr, 369 U.S. 186, 211 (1962). In case of a conflict between the interpretation given the federal constitution by the legislature, and that given it by the Supreme Court, a long line of constitutional jurisprudence unequivocally states that the interpretation of the Supreme Court prevails. United States v. Nixon, 418 U.S. 683, 703-704 (1974) (citations omitted).

RFRA presents a classic example of this sort of disagreement among the branches of government. Pursuant to the doctrine of separation of powers, this Court, and not Congress, is the final arbiter of the meaning of the federal constitution and its amendments. Nor can RFRA's rejection of Employment Division v. Smith and purported "restoration" of Sherbert/Yoder be saved by characterizing it as a restoration of constitutional protection, as Petitioner has done. "The establishment or reduction of constitutional rights cannot be accomplished either by congressional action or executive fiat. This is perhaps the most fundamental concept of constitutional supremacy." Clark v. Board of Ed. of Little Rock School Dist., 374 F.2d 569, 570 (8th Cir. 1967).[20]

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[20] See also In re Brichard Securities Litigation, 788 F. Supp. 1098 at 1102-03, 1112 (N.D. Cal. 1992) ([I]t is quite clear that Congress cannot subject the judgments of the Supreme Court to the reexamination and revision of any other department of government.

For precisely these reasons, courts have already begun to question the constitutionality of RFRA. In a recent federal court decision, a church seeking an exemption from a city zoning ordinance invoked RFRA, arguing that the city could not show a compelling interest to justify its zoning ordinance, and that the ordinance was therefore unconstitutional. The court stated that "[t]he church's argument is flawed, however, to the degree it relies on the RFRA as proof positive of the ordinance's constitutionality; Congress's codification of certain Supreme Court opinions is not dispositive of the constitutional parameters of the free exercise of religion." Celestial Church of Christ, Inc. v. City of Chicago, 1994 W.L. 282, 304 (N.D. Ill. June 22, 1994).

Similarly, in dicta, the Seventh Circuit questioned Congress's power to reverse the Smith decision, stating that the constitutionality of RFRA "raises a number of questions involving the extent of Congress's powers under Section 5 of the 14th Amendment." Canedy v. Boardman, 16 F.3rd 183, 186 n.2 (7th Cir. 1994).

Respondents contend, as they did on rehearing before the Alaska Supreme Court, that RFRA is violative of the doctrine of separation of powers and therefore unconstitutional. Congress simply may not instruct this

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. . . Congress may not enact a law that contravenes the Supreme Court's judgment on questions of constitutional interpretation) (citations omitted).

Court as to the proper interpretation of the federal constitution. Employment Division v. Smith, and not the Religious Freedom Restoration Act, governs Petitioner's claim to an exemption under the free exercise clause of the First Amendment to the U.S. Constitution.

IV. IT IS NEITHER NECESSARY NOR APPROPRIATE FOR THE COURT TO REEXAMINE AND OVERRULE EMPLOYMENT DIVISION V. SMITH

Petitioner urges the Court to grant his petition in order to revisit and overrule Employment Division v. Smith, 494 U.S. 872 (1990). See Petition at 24-27. Smith should be overruled, according to Petitioner, because it has been criticized by some legal scholars and because Congress expressed disapproval of its holding in enacting RFRA.

This Court should decline Petitioner's invitation for two reasons. First, the Court has already reaffirmed its Smith analysis in Church of the Lukumi Babalu Aye v. City of Hialeah, 113 S. Ct. 2217 (1993). That case presented the Court with an opportunity to reexamine and overrule Smith had it wished to do so. Instead, the Court precisely followed Smith in analyzing the Petitioners' free exercise claims. It is thus unnecessary for the Court to again state that the test set forth in Smith remains the law of the land.

Second, and more importantly, the rule of *stare decisis* requires respect for, and adherence to, prior

judicial rulings except in extremely rare instances. Petitioner has not shown that this is such an instance.

In Planned Parenthood v. Casey, 112 S. Ct. 2791 (1992) this Court had occasion to apply the rule of *stare decisis* in connection with its reexamination and reaffirmation of Roe v. Wade, 410 U.S. 113 (1973). While noting that the Roe decision has "engendered opposition", the Court stated that "the very concept of the rule of law underlying our own Constitution requires such continuity over time that a respect for precedent is, by definition, indispensable." Planned Parenthood v. Casey, 112 S. Ct. at 2808.

The Court then outlined a four-part analysis for determining whether to overrule a prior case: Whether the rule of the prior case has been found to be "unworkable"; whether the rule has been relied upon so as to cause a special hardship if it were overruled; whether the law has developed so far since the enactment of the rule that it is "no more than a remnant of abandoned doctrine"; and whether facts have so far changed "as to have robbed the old rule of significant application". Planned Parenthood, 112 S. Ct. at 2808-2809.

Application of this standard to Employment Division v. Smith clearly reveals that the constitutional analysis set forth in that decision remains viable. An examination of cases decided since Smith demonstrates

that the Smith analysis is workable and straightforward[21]. Overruling Smith merely because its holding has engendered controversy "would seriously weaken the Court's capacity to exercise the judicial power and to function as the Supreme Court of a Nation dedicated to the rule of law." Planned Parenthood, 112 S. Ct. at 2814.

CONCLUSION

For the reasons set forth herein, Respondents believe this is not an appropriate case for the exercise of this Court's discretionary jurisdiction. Respondents therefore request that the Court deny the Petition for Writ of Certiorari.

DATED this 23rd day of August, 1994.

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[21] See Kissinger v. Board of Trustees, 5 F.3d 177 (6th Cir. 1993) (university not required to alter its veterinary medicine curriculum, which was generally applicable to all students, to accommodate student who objected to one course for religious reasons); American Friends Service Comm. v. Thornburgh, 961 F.2d 1405 (9th Cir. 1991) (applying generally applicable employer sanctions under Immigration Reform and Control Act does not violate religious organization's free exercise rights); Ryan v. U.S. Dept. of Justice, 950 F.2d 458 (7th Cir. 1991) (FBI agent discharged for violating neutral and general rules of conduct not entitled to exemption based on religious views).